Bureau, based on its proposed conclusion that the Church is an EEO scofflaw that had no EEO program, apparently views everything the Church has ever said about the nature and extent of its EEO program as a lie designed to cover up that "fact." To the contrary, the Church never misrepresented its EEO program or had any reason to do so. Indeed, there was nothing wrong with KFUO's EEO program that would have required false representations about the program in order to obtain renewal of KFUO's licenses.[12/] KFUO therefore did its best to answer the questions posed in the renewal applications and in subsequent Commission letters, and assumed that the Commission would have no problems with the program. As the review of EEO case precedent included in the

---

[12/] A careful analysis of the Bureau's allegation of "misrepresentation" in paragraph 26 of its proposed findings shows that the Bureau's real contention is that (a) the Church has a more expansive view of its First Amendment rights than does the Bureau; and (b) the Church's statement that it sought "qualified" applicants is not consistent with the Bureau's own view of the Church's right to use religious qualifications under the First Amendment. See Bureau's Findings and Conclusions at 58-59. For all the reasons given in the Church's Findings and Conclusions, however, the Bureau's position is untenable after Amos. In any case, what the Bureau has shown at most is that the Church was confused about its right to have religious qualifications for various jobs at KFUO and the Church therefore believed it could truthfully make the statement that it sought all qualified applicants. In view of the Commission's failure to provide guidance regarding the EEO programs of religious licensees -- either before or after Amos -- the Church's confusion is surely understandable and can hardly be converted through alchemy into some sort of "misrepresentation" or "lack of candor." The Church did not misrepresent or lack candor in connection with any filing with the Commission.

Church's Findings and Conclusions makes clear,[13/] KFUO was correct in its assessment that KFUO's EEO program substantially complied with the Commission's EEO rule and that KFUO therefore had nothing to hide.

32. Viewed from this perspective, it becomes clear that the "misrepresentations" of which the Bureau complains fall into two categories: semantic disputes in which the Bureau believes that a word used by the Church means more or less than the context actually indicates, and disputes over whether information that was never requested and has never been found relevant in any prior cases should for some reason have nonetheless been included in KFUO's renewal applications. Even if the Bureau is given the benefit of the doubt on both of these matters, the worst conclusion that could possibly be drawn is that KFUO's staff should have used more precise terms that the Bureau could not possibly misinterpret. Such a fault has never been found to demonstrate misrepresentation or lack of candor.

33. It is also important to note that neither the Bureau nor the NAACP has been able to present a single record citation indicating that either the Church or anyone connected with KFUO ever had an intent to deceive the Commission on any point. Deceptive intent is essential to any finding of misrepresentation/lack of candor. Fox River Broadcasting, Inc., 93 F.C.C.2d 127, 129 (1983) ("[B]oth misrepresentation and lack

---

[13/] Church's Findings and Conclusions at 103-11.

of candor represent deceit; they differ only in form."); see also KQED, Inc., 3 FCC Rcd 2821, 2826 (Rev. Bd. 1988), aff'd, 5 FCC Rcd 1784 (1990), recon. denied, 6 FCC Rcd 625 (1991). Lacking any evidence of an effort at deceit, no misrepresentation/lack of candor can be found.

34. Because there is indeed no evidence of an intent to deceive in the record of this proceeding, both the Bureau and the NAACP have sought to circumvent the need for such facts by speculating that a deceptive intent must have existed since the Church would have had an incentive to make its EEO program look good to the Commission. Bureau's Findings and Conclusions at 57-58; NAACP's Findings and Conclusions at 146. If that alone were sufficient to support an inference of misrepresentation/lack of candor, then every Commission licensee could be found to have committed misrepresentation, since every licensee has an incentive to "look good" to the Commission. Clearly, there must be at least some supporting facts before such an inference can be made.[14/] "The Commission will not infer deceptions or improper

---

[14/] The Church notes that the Bureau relies on Scott & Davis Enterprises, Inc., 88 F.C.C.2d 1090 (Rev. Bd. 1982), for the proposition that deceitful intent can be found where there is a "logical reason or desire to deceive." Bureau's Findings and Conclusions at 58. However, the surrounding language, which was not quoted by the Bureau, is very instructive:

> The burden still remains on the proponent of the issue (Brazos) to make a prima facie showing of a logical reason or desire to deceive, and Brazos has failed to do so. Its list of immaterial errors, oversights, and

(continued...)

motives from an enumeration of alleged application errors, omissions, or inconsistencies, accompanied by speculation and surmise but lacking factual support." Garrett, Andrews & Letizia, Inc., 86 F.C.C.2d 1172, 1180 (Rev. Bd.), aff'd, 88 F.C.C.2d 620 (1981) (citation omitted). Neither the Bureau nor the NAACP has presented anything but speculation and surmise.

35. Moreover, as discussed above, KFUO believed (and continues to believe) that its EEO program substantially complied with the Commission's EEO rule, and KFUO therefore had no more incentive than any other licensee to mislead the Commission. The Bureau and the NAACP are therefore left with bare, unsupported conjecture, and that hardly rises to the level of "clear, precise and indubitable" evidence necessary to sustain the serious charge of misrepresentation/lack of candor. Riverside Broadcasting Co., 56 R.R.2d 618, 620 (1984) (citing Overmyer Communications, Co., 56 F.C.C.2d 918, 925 (1974), quoting Mammoth Oil v. United States, 275 U.S. 13, 52 (1927)). See also Scott & Davis Enterprises, Inc., 88 F.C.C.2d 1090, 1099 (Rev. Bd. 1982). Thus, even without reviewing the specific facts of the alleged

---

[14] (...continued)

> ambiguities in Scott's application is no substitute. Garrett, Andrews & Letizia, supra, 86 FCC 2d at 1180, 49 RR 2d at 1007.

Scott & Davis Enterprises, Inc., 88 F.C.C.2d at 1100. Like the party in Scott & Davis, the Bureau and the NAACP have presented a number of statements by the Church that were at most "immaterial errors, oversights, and ambiguities," and that is far from sufficient to demonstrate a deceptive intent on the part of the Church.

misrepresentations, it is possible to resolve the misrepresentation/lack of candor issue in the Church's favor. Because, however, the Church wishes to put the Bureau's speculations to rest once and for all, the claims of misrepresentation/lack of candor are addressed individually below.[15/]

A. The Allegations of Misrepresentation/Lack of Candor Regarding the Extent and Nature of KFUO's EEO Program

36. The Bureau's claim that the seventh largest Protestant denomination in the United States and one of the Commission's oldest license-holders is somehow not sufficiently "candid" to hold a broadcast license is outlandish. It appears to be based on the Bureau's contention that the Commission "could not have guessed" the extent to which the Church relied on Lutheran sources for its hiring referrals based on the statement in the renewal applications that "it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants."[16/]

15/ As mentioned in ¶ 13, supra, the long and repetitive list of purported misrepresentations alleged by the NAACP are addressed separately in Appendix A.

16/ The extent to which the Bureau has had to ignore the record and skew the meaning of statements by the Church in order to reach its objective of non-renewal of KFUO's licenses is beyond belief. For example, in arguing that KFUO's renewal applications should have disclosed any job qualifications utilized by KFUO, the Bureau actually states:

> The modification of "minority and female applicants" by the word "qualified" could not reasonably alert the Commission that the

(continued...)

Bureau's Findings and Conclusions at 58. Even if that were true, it is irrelevant since, under Amos (and even to some extent under King's Garden), there is nothing wrong with a church using church sources for applicant referrals. The Bureau's statement is akin to saying the Commission "could not have guessed" from the renewal applications the extent to which KFUO utilized newspaper ads rather than magazine ads in its EEO program. It does not matter -- either source is a valid effort at recruitment.

37. Moreover, as is the case with all of the alleged misrepresentations, the Commission had no need to "guess" about the use of various referral sources or any of KFUO's other employment practices, since the Church gave that information to the Commission at the first possible opportunity after receiving notice through a standard Commission letter of inquiry that a more extensive examination of KFUO's hiring was underway and would require the submission of more detailed information than

---

16/ (...continued)

> stations' recruitment efforts were limited by employment criteria . . . .

Bureau's Findings and Conclusions at 58. The Church cannot imagine what the Bureau could possibly have thought the word "qualified" meant other than that applicants for jobs had to meet certain employment criteria (i.e., in order to be qualified for the job). Also, it is important to note that the Church did not deviate from the Form 396 in using the word "qualified." The Form 396 specifically refers to attracting "qualified minority and women applicants." Church Ex. 9.

had been requested in the Commission's renewal application.[17/] If the Church had believed that the information at issue was requested by the renewal applications and had wanted to conceal it, it would make no sense for the Church to have then revealed that information at the very first opportunity. As the Presiding Judge wrote in Dixie Broadcasting, Inc., 8 FCC Rcd 4386, 4403 (ALJ 1993):

> It would have made no sense for [the witness] to have attempted to deceive the Commission by reporting only 20 hires, and then to have given up this ruse or changed his mind in January 1992 and reported that [the applicant] hired over five times that number. The surest way to have exposed deception was to have done what [the applicant] did. This scenario is completely inconsistent with an intent to mislead or deceive.

Quite simply, providing information when it is requested is neither misrepresentation nor a lack of candor.

38. In addition to complaining that KFUO failed to include information in its renewal applications that no other licensee has ever provided in a renewal application, the Bureau finds fault with KFUO's renewal applications for indicating that it was KFUO's policy to "seek out qualified minority and female applicants" and "actively seek female and minority referrals."

[17/] The very reason the Commission has a "standard" EEO letter of inquiry is because the renewal application does not ask for such detailed information, and if the Commission wishes to review a station's EEO program in more detail, it must request additional information from the station by way of letter.

The Bureau contends that this language, "if not knowingly false, [is] less than candid." Bureau's Findings and Conclusions at 57.

39. The Bureau's argument that the language in the EEO Program in and of itself constituted lack of candor is unprecedented in the annals of Commission EEO cases. Numerous license renewal applicants have been reprimanded over the years for EEO programs that were not sufficiently active, but the Commission has never previously even suggested that a station's failure to "live up" to its EEO program would subject the licensee to a charge of misrepresentation/lack of candor.[18/]

40. In this connection, it must be remembered that the Commission's Model EEO Program (FCC Form 396), from which KFUO's EEO statement in the renewal applications is derived, is a boilerplate form fashioned by the Commission. The form asks the licensee to fill in certain information, and speaks either to the present (i.e., the time of signing) or in some instances to the

---

[18/] See, e.g., Dailey & Reich, 6 FCC Rcd 4672, 4673-74 (1991) (station received a $13,000 fine and a short term renewal subject to reporting conditions where it had no record of having received minority referrals from any sources until two minorities were referred by employees during the last sixteen months of the license term, the licensee recruited by personal contacts and did not list openings in publications until the end of the license term, and the station hired no minorities until after the filing of its renewal application although its market was 30.0% minority and 28.1% African-American); In re Applications for Renewal of Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia, 6 FCC Rcd 5968, 5972 (1991) (station was fined $15,000 and received reporting conditions where it did not employ any African-Americans until July 1988, the last year of the license term, although African-Americans were the dominant minority and represented 26.3% of the available labor force).

preceding 12 months. The form does not even indicate whether it is supposed to be retroactive for the entire license term, or whether it is supposed to be prospective for the upcoming license term. Given the lack of clarity in the form and the period of time it covers, the Bureau cannot show that a conflict exists between KFUO's conduct and the statements in KFUO's renewal applications. Certainly nothing in KFUO's statements constituted a misrepresentation or lack of candor.

41. Moreover, that KFUO's staff did not believe there was any conflict between the language of the renewal applications and KFUO's employment practices is apparent from the record. See, e.g., Church Ex. 4 at 16-19. KFUO had publicized openings through minority employee referrals and external recruitment sources during the License Term, and in July 1989 had sent recruitment letters to at least ten local universities and personnel agencies stating that KFUO-FM encouraged minority applications and seeking help in recruiting minorities. Based on these efforts, Dennis Stortz added a sentence to the section on "Recruitment" in the Equal Employment Opportunity Program in KFUO's 1989 renewal applications indicating that KFUO "actively seek[s] female and minority referrals." Whether the Bureau and the NAACP would agree with Mr. Stortz on this point is irrelevant since misrepresentation/lack of candor requires an intent to deceive, not just a statement with which others disagree. Both the Bureau and the NAACP extensively cross-examined the Church

witnesses, and the witnesses' testimony was consistent, sincere, and candid. See NAACP's Findings and Conclusions at 152.

42. The Bureau's conclusion that a conflict existed between KFUO's renewal applications and station practice is premised on the Bureau's mistaken belief that the question in the model EEO Program asked for a representation concerning the entire License Term. Bureau's Findings and Conclusions at 57. However, Dennis Stortz explained what time frame he had in mind when he answered the question:

> Q. [By Mr. Zauner]: You indicate "We contact the various employment services and actively seek female and minority referrals." Was that true for the license renewal period or only true for the end of the -- that period?
>
> A. We contacted various sources throughout the license period, never rejected any female or minority referrals and specifically toward the end of the license period we specifically did that.

Tr. 776. If the Commission had intended that respondents use a different time frame than the present, it presumably would have included a statement to that effect in its form. The form is, however, silent on the issue. In addition, the Bureau has cited no case that clarifies the meaning of the form, even if the Church could plausibly have been expected to review prior Commission decisions before filling out the form. In short, there should be no doubt that it is improper for a government agency to ask an, at best, ambiguous question, and then accuse a respondent of lying when it answers the question that was asked

rather than the question the agency swears that it meant to ask.[19/]

[19/] Where the Commission has in the past provided inadequate or ambiguous public notice of its application requirements, it has acknowledged the due process rights of applicants and refused to disqualify applicants for not meeting the Commission's unexpressed desires in filling out the application. See Boles-American Indian, A Partnership, 4 FCC Rcd 2465, 2465-66 (M.M. Bur. 1989) (where Federal Register publication of a clarification indicating that only applicants for NCE-reserved channels are exempt from the Section 73.315(a) minimum strength requirement had occurred, but FCC Form 340 had not yet been revised to require submission of information showing compliance with the requirement by NCE-FM applicants for non-reserved channels, "elementary fairness compels clarity in the notice of the material required" and an NCE-FM applicant for a non-reserved channel was reinstated); Special Markets Media, Inc., 4 FCC Rcd 5753, 5753 (1989) (where Docket 80-90 order adopted a buffer-zone to protect Class C stations operating with less than the minimum Class C facilities from new allotments, but did not mention that applicants seeking FM assignments must also provide protection of the buffer-zone, the Commission held that the order "failed to provide a clearly articulated and unambiguously stated standard" and that "fundamental fairness dictates" that the applications be reinstated); Deas Communications, Inc., 7 FCC Rcd 6757, 6760 (Rev. Bd. 1992) (dismissal of FM application because engineering showing did not conform to Section 73.316(b)(2) was improper where no specific language in either Section 73.316(b)(2) or the "hard look" policy suggests that an error in this engineering data will result in automatic dismissal and in no published case had an applicant ever been summarily dismissed for such an error). The Bureau's argument that KFUO should have provided information not requested in the application is both illogical and unsupported by any prior precedent. The Bureau's far more extreme argument that KFUO's failure to do so amounts to a lack of candor is preposterous, and shows once again that, for whatever reason, the Bureau is more interested in the end result of non-renewal than in applying the law to the facts of this case to achieve a fair judgment on the merits.

B. The Allegations of Misrepresentation/Lack of Candor Regarding the Classical Music "Requirement" Language

43. The Bureau argues that the Church's statements regarding the Church's classical music experience requirement for certain KFUO-FM employees were incorrect and thus a misrepresentation. There is, however, no dispute in the record that KFUO's consultant recommended that the Church adopt this requirement for salespersons. Tr. 217, 220-21, 873. Moreover, it was never disputed that the Church in fact sought such individuals. The Bureau's complaint is therefore only that KFUO-FM did not always succeed in attracting such individuals and thus should have used a more subjective word than "requirement," such as "preferred." Bureau's Findings and Conclusions at 60-61. This semantic criticism surely does not establish any misrepresentation.

44. KFUO raised the requirement with the Commission because it believed that the classical music employment criterion was relevant in making an evaluation of KFUO's EEO record. Whether it was called a "preference" or a "requirement" would not change that fact. The word "preferred" would have also made the point, and Marcia Cranberg testified that she would have raised the point regardless of whether the classical music experience criterion was expressed as preferred or required. Tr. 1028. The Church therefore had no motive to deceive the Commission through the use of the word "required," and neither the Bureau nor the

NAACP has been able to cite any motive for Mr. Stortz to have used the word "requirement" rather than "preferred."[20/]

45. In fact, given the hostility with which the classical music job criterion has been met at the Commission, KFUO has had far more of an incentive to downplay the extent of its application to job openings than to overplay it. The fact that the Church has not done that demonstrates both that the Church truly believed in the validity of the criterion as a job requirement, and that the Church, despite the Bureau's speculation to the contrary, is not the type of licensee that is willing to revise the truth merely because it is in its interest to do so in order to please the Commission. There was no misrepresentation/lack of candor involved.

20/ The Church notes that in terms of employment criteria, the phrases "required" and "preferred" or "desirable" are often used by people interchangeably without any intent to mislead. The best example the Church can give is in paragraph 92 of the NAACP's Findings and Conclusions, where the NAACP claims that the internal job description of the Chief Engineer had a religious "requirement," but the NAACP's own chart (on page 36 of its findings) shows that the job description stated that it was merely an "other desirable" characteristic. If the Bureau's and the NAACP's theory that referring to a "preferred" employment criteria as a job "requirement" amounts to misrepresentation, then the NAACP has made a misrepresentation to the Presiding Judge. The Church is confident, however, that the NAACP no more intended to mislead the Presiding Judge than the Church intended to mislead the Commission in using the word "requirement." The simple fact of the matter is that, as the NAACP's own practice shows, the substitution of the one word for the other is not uncommon and evidences no intent to deceive.

C. The Allegations of Misrepresentation/Lack of Candor Regarding the Religious Training Criterion

46. The NAACP claimed in its petition to deny KFUO's renewal applications that minority representation on KFUO's staff was not proportionate to minority representation in the St. Louis labor force. M.M. Bur. Ex. 3 at 3. Responding to that claim, the Church noted in its February 23, 1990 Opposition to Petition to Deny that measuring KFUO's staff against the general labor force was deceptive since many of the job openings at KFUO required Lutheran training, and the percentage of Lutherans who are minorities is lower than the percentage of the local labor force that is minority. Church Ex. 4, Att. 7, at 8-11.

47. The Bureau now complains that the Church lacked candor in not disclosing this qualification in the renewal applications.[21/] Bureau's Findings and Conclusions at 58-59.

21/ The Bureau argues that without disclosure of the Lutheran training job requirement in the renewal applications, the Commission had no way of knowing the Church used such a requirement, since "not all church-licensed stations have such requirements." Bureau's Findings and Conclusions at 58. The Bureau presents no evidence to support this very questionable assertion. The existence of King's Garden indicates otherwise, as does the Title VII exemption enacted by Congress allowing religious entities to utilize religious preferences in hiring. At any rate, if the Commission believes that it must have individualized information on the hiring criteria of every religious licensee, it should either request that information in the Form 396 or, at a minimum, provide the guidance (regarding EEO and the reporting of hires) that religious licensees have been seeking from the Commission without success for over twenty years. The Commission's failure to provide such guidance is described in paragraph 144 of the Church's Findings and Conclusions.

The Bureau's complaint is groundless. The FCC Form 396 asks only for raw employment and referral data. See Church Ex. 9. It does not ask for anything more.[22/] The religious training requirement is in no way relevant to that data until a petitioner, such as the NAACP, attempts to draw an inference from the data to the effect that any statistical disparity with the local labor force can only be the result of poor EEO efforts. At that point, it is appropriate for a licensee to raise religious or other requirements as a defense to that inference. These requirements often provide an alternative explanation for any statistical disparity and therefore defeat the adverse inference sought by the petitioner. Cf. Florida State Conference of Branches of the NAACP v. FCC, 24 F.3d 271, 274 (D.C. Cir. 1994).

48. It makes no sense for a station to put forth a defense against such an incorrect inference until a party argues that such an inference should be made. The Church is unaware of any other licensee that has raised such a defense prior to responding

---

22/ It is of interest to note that the Bureau, in arguing the standard of disclosure applicable here, quotes Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied sub nom. W.W.I.Z., Inc. v. FCC, 383 U.S. 967 (1966), for the proposition that licensees must "be scrupulous in providing complete and meaningful information." Id. at 830. The actual quote from Lorain Journal Co., however, asks that licensees "be scrupulous in providing complete and meaningful information provided for in forms and regulations." Id. (emphasis added). As the Church has stated repeatedly herein and in the Church's Findings and Conclusions at 135 n.69, the Form 396 does not provide for the submission of the kind of information here at issue, and no regulation requires its submission separate from the Form 396.

to a petition to deny or letter of inquiry, and neither the Bureau nor the NAACP has demonstrated that such information in any way affects the accuracy of the raw statistics requested in FCC Form 396. The claim that such information should have been disclosed in the original renewal applications is groundless, and the further claim that the failure to include that information amounts to an intentional deception is nonsensical.

49. The Church is disturbed by the Bureau's notion that, while every other licensee is required to defend its employment statistics only after those statistics have been attacked, religious licensees must act anticipatorily and defend their employment statistics without even knowing if and how they are being attacked. This would be a highly suspect practice under any circumstance, but where such a defense or explanation is not even requested in the FCC Form 396, such a practice would be nothing more than a trap for religious licensees unable to read the Commission's mind.

50. Further clarifying the divergence between the Bureau's position and normal Commission practice, in a section marked "optional," the FCC Form 396 does allow a licensee to supply alternate labor force data if it believes normal MSA/county labor force statistics would be deceptive in evaluating its EEO program. Despite the fact that, unlike job requirements, there actually is a question on the form regarding alternate labor force data, the Commission has <u>never</u>, in all of history, found that a licensee lacked candor because it left that question blank

and then later responded to a petition to deny by arguing that alternate labor force figures are necessary in order to fairly review the licensee's EEO program.

51. Similarly, there is an "Other Information" portion of the FCC Form 396 which states:

> You may also describe other information that you believe would allow the FCC to evaluate more completely your efforts in providing equal opportunity in employment at your station. Submission of such information is optional.

Church Ex. 9 at 5 (emphasis added). The Church may be using a different dictionary than the Bureau and the NAACP, but it has never understood "optional" to mean "if you don't list every conceivable detail of your station's employment practices right now you are committing misrepresentation and will have your license taken away."

52. This matter is really quite simple. The form does not request the information, the Church had no reason to include it, the Church disclosed the job qualification as soon as it became material to the matter, and there is no evidence in the record that the Church ever sought to conceal that information by not including it in the renewal applications. There is not even a hint of misrepresentation or lack of candor in any of this.

D. The Allegations of Misrepresentation/Lack of Candor Regarding the Part-Time Seminary Work/Study Program

53. In an argument very similar to the "Lutheran training" argument discussed above, the Bureau complains that the Church should have informed the Commission of its part-time work/study program involving seminary students and their spouses. This complaint is groundless for much the same reasons as the "Lutheran training" argument. First of all, the information was not requested in the renewal applications. Second, the training program was not particularly relevant to KFUO's EEO Program Report since the training program involved mostly part-time employees, and part-time employee statistics were not even included in the renewal applications. Third, as soon as the Commission requested information beyond the raw employment data in the renewal applications as part of its expanded inquiry, KFUO provided the information regarding its training program. Fourth, and finally, the Bureau does not contend that the program was unlawful, and the Church therefore lacked even an incentive to conceal the existence of the training program -- a program that has been in effect for literally decades. As with the "Lutheran training" requirement, there are no indications whatsoever that any misrepresentation/lack of candor was involved.

E. The Allegations of Misrepresentation/Lack of Candor Regarding The Discrepancy in the Number of Hires

54. The Bureau observes that "[t]he HDO specified the misrepresentation/lack of candor issue, in part, because of a discrepancy in the number of hires reported by KFUO and KFUO-FM for the October 1, 1988 to September 30, 1989 time period." Bureau's Findings and Conclusions at 54. In fact, a review of the Hearing Designation Order reveals that the numerical discrepancy in hires was a major factor leading to designation of the misrepresentation/lack of candor issue, with the other matters addressed above being subsidiary to that alleged misrepresentation. In re Applications of The Lutheran Church/Missouri Synod, Hearing Designation Order, 9 FCC Rcd 914, 924-25 (1994) ("HDO"). The Church has contended all along that the numerical discrepancy was merely an employee's innocent error and nothing more. See Church's Findings and Conclusions at 123-30. Having now had a chance to examine the witnesses, the Bureau and the NAACP agree with that conclusion,[23/] with the Bureau stating that the minor numerical mistakes that were made in

---

23/ The Church does wish to take exception to the NAACP's unwarranted attack on Paula Zika, in which the NAACP calls Ms. Zika "the least competent person KFUO could have found" to calculate the number of hires. NAACP's Findings and Conclusions at 139. The Church does not believe it was unreasonable to ask the person at KFUO who was the Director of Business Affairs, the most senior non-engineering station employee, and the keeper of the stations' business and personnel records, to provide employment information for the renewal applications. Moreover, Ms. Zika was a credible witness whose testimony was not attacked at all by the NAACP.

counting hires "do not constitute misrepresentation or lack of candor" and that "[n]one of these errors suggest intentional deceit." Bureau's Findings and Conclusions at 56, 55. Like the other "misrepresentations" raised in the HDO, the facts simply do not support any finding of deception, and the misrepresentation/lack of candor issue must be resolved in favor of the Church.

CONCLUSION

55. The purpose of this proceeding is to determine whether the Church's continued operation of KFUO(AM) and KFUO-FM will serve the public interest. As has been shown through great effort and expense on the part of the Church in this proceeding, there is no reason to believe the Church would provide anything less than exemplary service to the public, as it has done so for 70 years with a record of rule compliance that is impeccable. The goal of that vast effort has never been the enrichment of the licensee, but the enrichment of KFUO's community. That is a claim few broadcasters can make.

56. The Church, with its unique point of view, has striven to provide diverse programming to its service area through a daytime-only religious station and a full-time classical music station that also airs religious programming. KFUO's outstanding record and the harm to the public from the loss of that service weigh heavily in favor of a renewal grant. As the record shows, the Church has been honest, non-discriminatory, and at least in

substantial compliance with its affirmative action obligations. As the witnesses showed, KFUO is managed and staffed by highly ethical and sincere individuals dedicated to its public service mission. The loss of the licenses would be an act of fundamental injustice -- a penalty far out of proportion to any possible misdeed. It would also amount to the destruction of a national landmark -- the oldest religious station in the world, operated by one of the Commission's very first licensees.

57. If in this proceeding the Church is found for the first time in its history to have fallen short in fulfilling its licensee obligations, it is committed to correcting any shortcomings and paying a fair penalty lawfully imposed. The Bureau and the NAACP, however, have not proposed a fair penalty; they have proposed the death penalty. The record of this proceeding will not support such a sanction, nor would the St. Louis area public be served by it.

Based on the foregoing, the Church submits that the licenses of KFUO(AM) and KFUO-FM should be unconditionally renewed for full remaining terms with, at most, reporting conditions.

Respectfully submitted,

THE LUTHERAN CHURCH-MISSOURI SYNOD

By: _____

Richard R. Zaragoza
Kathryn R. Schmeltzer
Barry H. Gottfried
Scott R. Flick
Lauren Ann Lynch

Its Attorneys

FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

October 31, 1994

APPENDIX A

The NAACP's proposed findings do not recite the facts in the record. Instead, the NAACP makes a series of arguments, which distort the record and make numerous erroneous inferential leaps. The NAACP's proposed findings are too argumentative and biased to be used by the trier-of-fact, and the errors therein are far too numerous to count. The Church therefore attempts below to point out only the most obvious errors.

1. One over-arching error that the NAACP commits in its "Findings of Fact and Conclusions of Law" is to trammel the Church's due process rights by reaching far beyond the designated misrepresentation issue to allege new misrepresentations where none exist. As undesignated issues, these alleged misrepresentations cannot be used as the basis for an adverse determination in this proceeding since the Church had no notice or opportunity to introduce evidence on these allegations. Further, the vast majority of the misrepresentations alleged by the NAACP relate to issues about which the NAACP did not even cross-examine witnesses. Therefore, not only was the Church deprived of notice in the HDO that findings might be made on these matters, but it was not even given notice while its witnesses were on the stand that these alleged matters were at issue.

2. The purpose of a hearing designation order is to provide the "accused" with the level of notice required by due process considerations of the issues that are to be tried and against which it must defend itself. See Faith Center, Inc., 82 F.C.C.2d 1, 9 (1980), recon. denied, 86 F.C.C.2d 891 (1981).

This purpose would be vitiated if adverse determinations could be made on the basis of undesignated issues. The Review Board recently reversed an ALJ's ruling on this specific ground. Algreg Cellular Engineering, FCC 94R-12 (released July 22, 1994), at 49. In that case, the ALJ found that applicants had falsely certified their applications because the forms were incomplete when executed, and that the false certifications constituted a basis for revocation of their license grants. Id. at 48-49. The Review Board reversed on the basis that the applicants had no notice that false certification could be used as the basis for revocation of their licenses. Id. at 49. It is important to note that in the Algreg proceeding, unlike in the present case, the applicants were questioned extensively on the witness stand about their certification of the applications and a motion to enlarge based on the testimony elicited was filed with the ALJ. The Review Board still held that the applicants lacked adequate notice for a finding to be made in the matter. In the present case, the Church did not receive even the minimal notice that cross-examination would have provided, much less the level of notice necessary to allow findings on these matters.

3. Most of the misrepresentations that the NAACP now claims exist in this case are based on matters about which the NAACP did not even inquire at the hearing. In this respect, the NAACP's conduct is not unlike that of the Broadcast Bureau's in Television San Francisco, 5 R.R.2d 80 (ALJ 1965). In that case, the Broadcast Bureau proposed to participate in a hearing on only one issue but proposed to file proposed findings and exceptions

and otherwise to participate fully in the post-hearing process. Id. at 81. Hearing Examiner Donahue passionately objected to the Broadcast Bureau's proposal for the very reason that it could result in an applicant having to defend against issues first raised after hearing:

> If there is anything well established in our jurisprudence it is the principle that an accused has a right to face his accuser in open forum. . . . Is the confrontation so deeply ingrained in our law accomplished when a party's position first becomes known to its adversaries after the close of record and then only by way of pleading? Is it enough that a party can file a counter pleading? Is it enough that it can orally urge before review authority denial or amelioration of a late comer's attack? Is it enough that it can seek leave to hie itself back to Washington, and to hearing, to adduce proof to allay doubts raised by a Johnny-come-lately adversary as to the sufficiency of its evidence?

Id. at 82. As Hearing Examiner Donahue did in Television San Francisco, the Presiding Judge must respond with a resounding "No!" See also Charisma Broadcasting Corp., 8 FCC Rcd 864, 866, 866 n.3 (1993) (where no competing applicant even suggested questions to be posed to another applicant's principals regarding the applicant's integration proposal, the competing applicants were not entitled to reopen the record to inquire into this area); Consolidated Edison Co. v. Breznay, 683 F. Supp. 832, 836 (D.D.C. 1987) (untimely third party would not be allowed to intervene in administrative enforcement proceeding to introduce arguments on an issue the agency had already resolved in favor of defendant because the defendant "may be entitled to rely on an order of [the agency] explaining the theory of violation that it will be charged with."); Garrett, Andrews & Letizia, Inc., 88